

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CADET MANUFACTURING COMPANY,

Plaintiff,

v.

AMERICAN INSURANCE COMPANY,  
ROYAL INSURANCE COMPANY OF  
AMERICA f/k/a ROYAL GLOBE  
INSURANCE COMPANY, EMPLOYERS  
INSURANCE COMPANY OF WAUSAU,  
AMERICAN GUARANTEE AND  
LIABILITY INSURANCE COMPANY,  
FIREMAN'S FUND INSURANCE  
COMPANY, NATIONAL SURETY  
CORPORATION, GRANITE STATE  
INSURANCE COMPANY, CENTURY  
INDEMNITY COMPANY, GREAT  
AMERICAN INSURANCE COMPANY AND  
AGRICULTURAL EXCESS AND SURPLUS  
INSURANCE COMPANY,

Defendants.

Case No. C04-5411 FDB

ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
GRANITE STATE INSURANCE  
COMPANY'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
RE: NO OCCURRENCE

This matter comes before the Court on Plaintiffs Cadet Manufacturing Company (Cadet) and the Port of Vancouver, U.S.A. (Port), as assignee of Cadet's claims against Granite State, motion for

1 summary judgment declaring Granite State Insurance Company (Granite State) has a duty to  
2 indemnify Plaintiffs under insurance policies issued by Granite State to Cadet. Plaintiffs further seek  
3 a declaration that Granite State is obligated to pay all unsatisfied amounts of the Settlement  
4 Agreement between the Plaintiffs and two excess insurers, Century Indemnity Company and Great  
5 American Insurance Company, that are not the responsibility of another party, with prejudice  
6 interest.

7 Defendant Granite State has moved for partial summary judgment seeking dismissal of  
8 Plaintiffs claims for insurance coverage on the basis that no property damage occurred during the  
9 policy periods and therefore there was no occurrence. In the alternative, Granite State requests a  
10 determination that coverage is limited to the policy limits for one occurrence.

11 After reviewing all materials submitted by the parties and relied upon for authority, the Court  
12 is fully informed and hereby grants Plaintiffs' motion for summary judgment and denies Granite  
13 State's motion for partial summary judgment.

#### 14 INTRODUCTION AND BACKGROUND

15 This matter arises out of a declaratory judgment action commenced by Cadet against various  
16 primary and excess insurers who issued commercial general liability (CGL) policies to Cadet. Cadet  
17 (and its assignee, Port) seeks indemnification for environmental liabilities arising out of its  
18 manufacturing operations at the "Cadet" and "Swan" sites. The actions underlying this coverage  
19 action have been settled; all insurers have settled and have been dismissed from this case, except  
20 Granite State. The settlement has been found reasonable and approved by this Court by order dated,  
21 April 13, 2006. On previous motions for partial summary judgment, this Court determined that (1)  
22 Granite State must pay Cadet up to \$2,000,000 for every covered occurrence of property damage  
23 during its policy periods, (2) including the six-month stub policy period, (3) Granite State had a duty  
24 to defend Cadet once the underlying property-damage policy limits were exhausted, and (4) the Cadet  
25 and Swan manufacturing sites are separate sites of contamination and each a separate occurrence for

1 purposes of determining insurance limits. Cadet Manufacturing Co. v. American Insurance Co., et  
2 al., 391 F. Supp.2d 884 (W.D. Wash., 2005).

3 The history of the operation of manufacturing facilities and contamination of the Swan and  
4 Cadet sites is set forth in this Court's previous order. See, Cadet Manufacturing Co., at 887-88.  
5 Stated briefly, Cadet's predecessor, Swan operated a manufacturing facility (Swan Site) from  
6 approximately 1956 through approximately 1964. In 1964, Swan moved its operations to the site of  
7 the current Cadet facility (Cadet Site). In 1972, Cadet purchased Swan's assets and liabilities and  
8 continued operations at the Cadet Site. In 1982, the Port purchased the Swan Site.

9 In approximately 1998, the Port discovered soil and groundwater contamination, primary  
10 trichloroethylene (TCE) contamination, at the Swan Site. The Washington Department of Ecology  
11 (DOE) identified the Port and Cadet as potentially liable parties responsible for remediation of the  
12 environmental damages pursuant to the Model Toxics Control Act, RCW § 70.105D, *et. seq.*  
13 (MTCA).

14 In 1999, solvent contamination was detected in the soil and groundwater in the vicinity of the  
15 Cadet Site manufacturing facility. The DOE identified Cadet as the potentially liable party and as a  
16 result of subsequent investigation and negotiations, Cadet and the DOE entered into an Agreed  
17 Order, pursuant to which Cadet is responsible for remediation of the site.

18 The environmental contamination was caused by ongoing operations at the two facilities that  
19 spanned many years. Release of TCE at the Swan Site began in the 1950s and continued until 1964  
20 when the Swan Site operations were transferred to the Cadet Site. The release of TCE from the  
21 Cadet Site occurred from 1964 through 1971, when Cadet discontinued use of its degreaser unit.  
22 The release of TCE resulted in contamination of groundwater and subsurface soil at both sites.

23 In 1999, Cadet filed a Chapter 11 bankruptcy petition. On January 18, 2000, the Bankruptcy  
24 Court confirmed a plan of reorganization that provided that the only assets available for satisfaction  
25 of Cadet's environmental liabilities were the proceeds of its insurance policies. The plan allowed

1 Cadet to settle the environmental claims subject to court approval. The Port asserted a common law  
2 trespass claim and a contribution claim under the MTCA against Cadet.

3 Cadet tendered the defense of the claims by the DOE and the Port to its insurers that  
4 provided commercial general liability policies and excess policies in prior years. Cadet and the  
5 primary insurers entered into a settlement agreement that was approved by order of the Bankruptcy  
6 Court. The primary insurers agreed to pay Cadet over \$4 million and their policies were deemed to  
7 be exhausted. Cadet, the Port and the excess carriers began negotiations as to the issue of past and  
8 future costs incurred by the Port to remediate the contaminated sites. A settlement was reached  
9 between all parties, except Granite State. Over the opposition of Granite State, the Bankruptcy  
10 Court approved the settlement with the excess insurers. This Court reviewed the settlement and  
11 entered an order approving the settlement and barring claims against the settling insurers.

12 The settlement provides that the Port's claim against Cadet is allowed in the amount of \$20  
13 million, plus \$4 million estimated cost of completing the Cadet Site remediation. The Port agrees to  
14 purchase the Cadet Site, take responsibility for remediation and indemnify Cadet for any costs  
15 related to remediation of the soil and groundwater at the Cadet and Swan Sites. The settling excess  
16 carriers agreed to pay the Port a total of \$10, 000 million, \$6 million in satisfaction of the Port's  
17 claim and \$4 million for remediation at the Cadet Site. A claims bar protects the settling insurers  
18 from claims for contribution and indemnity by the non-settling insurer, Granite State. Cadet assigns  
19 to the Port the coverage claim against Granite State to recover (1) the remaining unpaid remediation  
20 costs of the Port's claim, (2) unpaid defense and indemnity amounts for the Cadet Site, and (3)  
21 contribution claim for past Cadet Site indemnity costs paid by the settling insurers but which are the  
22 responsibility of Granite State. In total, the settlement agreement provides Granite State's coverage  
23 liability at a minimum of \$15,678,961.

24 Granite State provided Cadet excess insurance coverage for the time period September 21,  
25 1978 to March 28, 1982. During this period, Granite State issued four excess policies to Cadet,

1 each having a \$2 million per occurrence property damage limit. By prior order the Court determined  
2 the contamination at the Swan and Cadet sites are separate occurrences and have no aggregate  
3 limits. Cadet Manufacturing Co. V. American Insurance Co., et al., 391 F. Supp.2d 884 (W.D.  
4 Wash., 2005).

### 5 SUMMARY JUDGMENT STANDARD

6 Summary judgment is appropriate where there is no genuine issue of material fact and the  
7 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party  
8 bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex  
9 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the  
10 opposing party must show that there is a genuine issue of material fact for trial. Matsushita Elec.  
11 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). A dispute as to a material fact is  
12 “genuine” if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving  
13 party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The opposing party may not rest  
14 upon the mere allegations or denials of the moving party's pleading, but must present significant and  
15 probative evidence to support its claim. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d  
16 1551, 1558 (9<sup>th</sup> Cir. 1991). For purposes of this motion, reasonable doubts as to the existence of  
17 material facts are resolved against the moving party and inferences are drawn in the light most  
18 favorable to the opposing party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9<sup>th</sup> Cir. 2000).  
19 Summary judgment is mandated where the facts and the law will reasonably support only one  
20 conclusion.

### 21 INSURANCE COVERAGE

#### 22 “Property Damage”

23 Granite State asserts that no property damage occurred during its policy periods and thus  
24 there was no occurrence triggering coverage. Granite State does not dispute the release of TCE from  
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1 the Swan and Cadet sites caused property damage that remained in the subsoil and groundwater  
2 throughout the Granite State insurance policies. Granite State nonetheless, argues that there was no  
3 property damage during its policy periods because the groundwater contamination plume had  
4 achieved a steady state by 1977; prior to the issuance of the Granite State policies. Granite State  
5 contends that coverage is premised on new damage taking place during the policy period.

6 It is undisputed that the Granite State policies provide coverage for “occurrences” resulting  
7 in “property damage” occurring during the respective policy periods. The Insuring Agreements  
8 provide that Granite State agrees, subject to limitations, to indemnify Cadet for all sums which Cadet  
9 shall be obligated to pay by reason of liability imposed upon Cadet by law for damages on account  
10 of property damage caused by or arising out of each occurrence happening anywhere in the world.  
11 The term “Occurrence” is defined as “an accident, or happening, or event, or a continuous or  
12 repeated exposure to conditions which unexpectedly and unintentionally results in ... property  
13 damage ... during the policy period.” “Property Damage” is defined as “physical injury to or  
14 destruction of tangible property, which occurs during the policy period, including loss of use thereof  
15 at any time resulting therefrom...”

16 Accordingly to Granite State, the term “Property Damage” requires the creation of damages  
17 during the policy period, not just the existence of damaged property. The policy definition simply  
18 provides for “**physical injury to ... property, which occurs during the policy period ...**” The  
19 term “occurs” is not defined in the policy.

20 In Washington, insurance policies are liberally construed to provide coverage for the insured  
21 whenever possible. Mercer Place Condo. v. State Farm, 104 Wn. App. 597, 602-03, 17 P.3d 626  
22 (2000). Undefined terms are given their plain, ordinary, and popular meanings. Panorama Village v.  
23 Allstate Ins. Co., 144 Wn.2d 130, 131, 26 P.3d 910 (2001). If the plain meaning is not clear, a  
24 dictionary definition can be used for clarification. State Farm v. English Cove Ass'n, 121 Wn. App.  
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1 358, 363, 88 P.3d 986 (2004). In standard dictionaries the term “Occur” has two definitions: **(1) to**  
2 **be found or met with: appear : exists**, and **(2) to present itself : come to pass : take place :**  
3 **happen.** Webster’s Third New International Dictionary of the English Language, Unabridged.  
4 Merriam-Webster (2002). Thus under standard definitions, there are two possible interpretations:  
5 (1) There is “Property Damage” under the policies when there is “physical injury or destruction of  
6 tangible property which [appears][exists] during the policy period, or (2), There is “Property  
7 Damage” under the policies when there is “physical injury or destruction of tangible property which  
8 [takes place][happens] during the policy period.

9 Looking at the policy, the language is, at the least, fairly susceptible to different, reasonable  
10 interpretations and accordingly, it is ambiguous. An insurance clause is ambiguous “when, on its  
11 face, it is fairly susceptible to two different interpretations, both of which are reasonable.” American  
12 Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc., 134 Wn.2d 413, 428, 951 P.2d 250  
13 (1998). Any ambiguities are resolved against the insurer and in favor of the insured. Id. The  
14 average person purchasing insurance would construe the policy language to provide indemnity for  
15 property damage that exists during the policy period. Because the language is, at the least,  
16 ambiguous, and because there is no extrinsic evidence from the record indicating an intent by both  
17 parties to exclude coverage, the Court finds there was “property damage” during the periods of the  
18 Granite State policies as that term is defined in the policies of insurance.

19 An additional basis for finding coverage is Washington’s adoption of the “continuous trigger”  
20 or “continuous damage” rule for determining insurance coverage for ongoing environmental  
21 contamination. B & L Trucking, at 425; Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F.  
22 Supp. 1400, 1417 (W.D. Wash., 1990). Under the continuous trigger approach, all insurance  
23 policies in effect during periods of ongoing damaged are triggered, not just the insurance policy that  
24 was in effect at the commencement of the initial property damage. B & L Trucking, at 425.

1 The contamination at the Swan and Cadet sites commenced prior to the effective dates of the  
2 Granite State policies and continued throughout the periods of coverage. Groundwater is not in a  
3 static state. The contaminants in the subsoil and groundwater migrate with the movement of the  
4 groundwater. The continuous and repeated exposure of soil and groundwater to TCE constitutes  
5 continuing property damage. Thus there is continuing property damage and a continuous triggering  
6 of coverages.

7 **“Neither Expected or Intended”**

8 As previously noted, the Granite State policy language defines “occurrence” as “an accident,  
9 or happening, or event, or a continuous or repeated exposure to conditions which *unexpectedly and*  
10 *unintentionally results in ... property damage* ... during the policy period.” To be an “occurrence,”  
11 a harmful event must be “neither expected nor intended from the standpoint of the insured to result  
12 in property damage. In other words, property damage that is expected or intended by the insured  
13 does not warrant coverage. Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 425, 38 P.3d 322  
14 (2002). The inquiry focuses on the subjective intent of the insured and whether the insured expected  
15 or intended the injury or damage. Queen City Farms, Inc. v. Cent. Nat'l Ins. Co., 126 Wn.2d 50,  
16 70-71, 882 P.2d 703, 891 P.2d 718 (1994).

17 Plaintiffs have presented testimony of employees stating unequivocally that Swan and Cadet  
18 did not intend property damage to result from the use and handling of TCE. There is additional  
19 testimony that during the operations of Swan and Cadet, the adverse environmental effects of TCE  
20 were generally unknown. Granite State’s evidence does not refute this testimony. Defendant merely  
21 refers to testimony concerning later-learned knowledge of the dangers of TCE.

22 There is no material issue of fact that the damage resulting from the release of TCE was  
23 intended or expected from the standpoint of the insured.

24 **Conclusion**



Granite States's motion for summary judgment re: no occurrence will be denied. There is no material issue of material fact putting coverage in issue. Cadet has coverage for the underlying claims under it's Granite State policies of insurance. Granite State is required to indemnify Plaintiffs under the insurance policies issued to Cadet.

#### NUMBER OF OCCURRENCES

Granite State issued four excess policies to Cadet, each having a \$2 million per occurrence property damage limit. By prior order, this Court determined the contamination at the Swan and Cadet sites are separate occurrences and have no aggregate limits. Cadet Manufacturing Co. V. American Insurance Co., et al., 391 F. Supp.2d 884 (W.D. Wash. 2005). Coverage is triggered for every policy in force during which property damage occurred. See, American Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc., 134 Wn.2d. 413, 425, 951 P.2d 250 (1998); Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F. Supp. 1400, 1417 (W.D. Wash., 1990). Thus, it would appear that Cadet has \$16 million in coverage under it's Granite State policies: four policies of coverage for the Swan site with \$2 million per occurrence limits and four policies of coverage for the Cadet site with 2 million per occurrence limits.

Granite State contends that only the occurrences at the Swan site are at issue and thus, the policy limits are 8 million. Granite State premises this argument on the assertion that the Cadet site occurrences have been satisfied and do not apply to the Port's underlying claims for remediation of the Swan site.

Granite State's argument is flawed. The underlying claim by the Port against Cadet is for contamination at the Swan site and for contamination migrating from the Cadet site onto Port property. Contamination of the Swan site is attributable to releases of TCE from both the Swan and the Cadet sites. Thus, the property damage to the Swan site is the result of occurrences from each site. Granite State's interpretation of the settlement is unpersuasive.

1 Cadet has coverage for both the Swan and cadet sites. This consists of four policies of  
2 coverage for each site, for total limits of coverage of \$16 million. Plaintiffs are entitled to  
3 indemnification up to the limits of coverage, \$16 million.

#### 4 SETTLEMENT AND AMOUNT OF COVERAGE

5 In Washington, when an insurer refuses to settle a claim, the insured and the claimant may  
6 negotiate a settlement on their own. Red Oaks Condominium Owners Ass'n v. Sundquist Holdings,  
7 Inc., 128 Wn. App. 317, 322, 116 P.3d 404 (2005); Chaussee v. Maryland Cas. Co., 60 Wn. App.  
8 504, 509-10, 803 P.2d 1339, 812 P.2d 487 (1991). The insurer is be liable for the settlement  
9 amount to the extent that it is reasonable. Red Oaks Condominium Owners Ass'n, at 322;  
10 Chaussee, at 510. Thus, it is common for parties to move for a hearing to determine the  
11 reasonableness of settlement agreements. Red Oaks Condominium Owners Ass'n, at 322; Besel v.  
12 Viking Ins. Co., 146 Wn.2d 730, 738-39, 49 P.3d 887 (2002). Once a settlement has been  
13 determined to be reasonable, the burden shifts to the insurer to show that it is the product of fraud or  
14 collusion. Besel, at 739. Where the insurer does not meet this burden, it is liable for the full  
15 settlement amount. Id.

16 The Bankruptcy Court and this Court have determined the Settlement Agreement reasonable.  
17 Granite State presented argument against the reasonableness of the settlement in the Bankruptcy  
18 Court and this Court. These arguments were rejected. The finding of reasonableness is settled.

19 Granite State, nonetheless asserts it is not bound by the Settlement Agreement and that it is  
20 entitled to litigate and defend itself from liability. The Settlement does not prevent Granite State  
21 from contesting coverage (liability). Granite State has done so in this summary judgment  
22 proceeding.

23 Under Washington law, all insurers providing coverage during any portion of the total time  
24 period of continuing damage are jointly and severally liable for all damages. American Nat. Fire Ins.  
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1 Co. v. B & L Trucking and Const. Co., Inc., 134 Wn.2d 413, 424-25, 951 P.2d 250 (1998). Under  
2 this rule, Granite State is responsible for all costs of the underlying claim in excess of the primary  
3 insurance up to policy limits. Granite State has put forth no argument supporting an underpayment  
4 or allocation of costs among insurers. The Settlement Agreement incorporates an allocation of risk  
5 that has been determined fair and reasonable.

6 Granite State is responsible for indemnification of the unsatisfied amounts of the Settlement  
7 Agreement, up to the limits of its coverages.

### 8 **PREJUDGMENT INTEREST**

9 In Washington, prejudgment interest is granted to compensate a party for the loss of use of  
10 money to which he was entitled. Hadley v. Maxwell, 120 Wn.App. 137, 141, 84 P.3d 286 (2004);  
11 Jones v. Best, 134 Wn.2d 232, 242, 950 P.2d 1 (1998). Prejudgment interest is favored in the law  
12 because it promotes justice. Hadley, at 142; Prier v. Refrigeration Eng'r Co., 74 Wn.2d 25, 34, 442  
13 P.2d 621 (1968). The claim need not arise out of contract or any specific cause of action; but it is  
14 available (1) when an amount claimed is 'liquidated' or (2) when the amount of an 'unliquidated'  
15 claim is for an amount due upon a specific contract for the payment of money and the amount due is  
16 determinable by computation with reference to a fixed standard contained in the contract, without  
17 reliance on opinion or discretion. Hadley, at 141-42; Prier, at 32; Seattle-First Nat. Bank v.  
18 Washington Ins. Guar. Ass'n, 94 Wn.App. 744, 759-760, 972 P.2d 1282 (1999). "A claim is  
19 liquidated if data in the evidence makes it possible to compute the amount with exactness, without  
20 reliance on opinion or discretion." Hadley, at 142; Lakes v. von der Mehden, 117 Wn.App. 212,  
21 217, 70 P.3d 154 (2003). It is widely acknowledged that a settlement made in an underlying civil  
22 action represents a liquidated amount with regard to the subsequent indemnity claim. King County  
23 v. Puget Sound Power & Light Company, 70 Wn.App. 58, 62, 852 P.2d 313 (1993).

Granite State asserts it cannot be subject to prejudgment interest because coverage and allocation are still at issue. However, a dispute over liability does not convert a liquidated claim into an unliquidated claim. The defendant's claim that he or she is not liable for part or all of the plaintiff's liquidated damages will not preclude a successful plaintiff from receiving prejudgment interest. Hadley, at 143-44; Prier, at 33; Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wash.2d 654, 685, 15 P.3d 115 (2000). "The defendant's belief that he or she never owed the money in the first place has never been an excuse for avoiding interest on a liquidated claim." Hadley, at 143; Prier, at 34; Colonial Imports v. Carlton N.W., Inc., 83 Wn.App. 229, 247, 921 P.2d 575 (1996). A liquidated claim remains so even if the defendant is partially successful in reducing his or her share of liability. Hadley, at 144; Weyerhaeuser, at 685; Prier, at 33. It is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a liquidated sum. Hadley, at 144; Weyerhaeuser, at 686.

Granite State's liability has been fixed. The settlement made in the underlying civil action represents the liquidated amount with respect to the indemnity claims. Accordingly, Cadet is entitled to an award of prejudgment interest.

### CONCLUSION

For the reasons set forth above, Defendant Granite States Insurance Co's motion for partial summary judgment will be denied. Plaintiffs Cadet Manufacturing Company and Port of Vancouver are entitled to summary judgment declaring (1) the policies of insurance issued by Granite State Insurance Company to Cadet provide coverage for the underlying claims, (2) the Settlement Agreement establishes the measure of damages of the underlying claim, (3) Granite State is liable for the unsatisfied amounts of the Settlement Agreement and (4) Granite State owes prejudgment interest on the liquidated unsatisfied Settlement Agreement.


ACCORDINGLY,

1 IT IS ORDERED:

2 1. Defendant Granite State Insurance Company's Motion for Partial Summary Judgment Re:  
3 No Occurrence [Dkt. #279] is **DENIED**.

4 2. Plaintiffs' Motion for Summary Judgment [Dkt. #274] that (1) the policies of insurance  
5 issued by Granite State to Cadet provide coverage for the underlying claims, (2) the Settlement  
6 Agreement establishes the damages for the underlying claims, (3) Granite State is liable for the  
7 unfunded amounts of the Settlement Agreement to the full extent of its coverage limits and (4) Cadet  
8 is entitled to prejudgment interest on the liquidated amount of the unfunded Settlement Agreement is  
9 **GRANTED**.

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11 DATED this 26<sup>th</sup> day of July, 2006.

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15 FRANKLIN D. BURGESS  
16 UNITED STATES DISTRICT JUDGE  
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